Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1976.

No. 76-1148

THOMAS HUGHES,

Petitioner,

against

LOUIS J. FRANK, Commissioner of Police of the Nassau County Police Department, and the NASSAU COUNTY POLICE DEPARTMENT,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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Petitioner's initial contention is that Rule 15 violates a "fundamental right" without serving a "compelling governmental interest". *Shapiro v. Thompson*, 394 U.S. 618, 22 L.Ed.2d 600, 8 S.Ct. 1322 (1969). Petitioner's contention is without merit. Participation in a military reserve program has never been held to be a fundamental right. Those rights which are protected by the Constitution as fundamental are basic human rights, rights very distinct from that which Petitioner asserts. As one federal court recently observed "Rights found to be fundamental include the right to procreate, the right not to procreate, the right to vote, freedom from incarceration due to indigency, the right to travel and certain criminal procedures". *Habron v. Epstein* _____ F. Suppl. _____, 44 L.W. 2517, (D.Md.1976) _____ Clearly, if there is a constitutional right to participate in the Naval Reserve, it is not of sufficient magnitude to require constitutional protections traditionally afforded to rights which are fundamental in nature.

If, however, the right to participate in military reserve programs is fundamental in nature, Petitioner's constitutional attack on Rule 15 must nevertheless fail, because Respondent demonstrated that the Rule serves a compelling governmental interest in that Respondent's responsibility is to guarantee an increasing population of Nassau County as effective police protection as possible. The Rule serves by providing a means through which the police force can minimize loss of manpower and the County can minimize the financial loss which might otherwise be incurred as the result of an unlimited number of police officers participating in the military reserve.

At present, the Rule is implemented by Respondent so as to allow a maximum of one hundred (100) police officers to participate in military reserve programs at one time. Even with this quota, Nassau County suffers a loss of three thousand (3,000) man days of police services per year. This is the equivalent of a fifteen man reduction in the size of the police force. In addition, participants in reserve programs are entitled to up to thirty (30) days of leave per year with pay from their regular jobs in order to pursue military reserve activities. This practice costs Nassau County an estimated $400,000 per year. The consequences to the County due to this personnel and monetary loss is particularly severe because of fiscal difficulties which the County is experiencing and a hiring freeze which prohibits the County from employing temporary personnel who theoretically supplement manpower lost to the military reserves.

Clearly, there is a compelling governmental interest in promulgating a rule which limits the number of police officers who may participate in military reserve programs at any one time.

Petitioner's alternative contention is that if there is no fundamental right to participate in the military reserves, there is, nonetheless, one of constitutional dimension, and that Rule 15 infringes this right without satisfying the "rational basis test" set forth in *McGowan v. Maryland*, 366 U.S. 420, 6 L.Ed. 2d 39.

This contention is also without merit. The Rule finds its rational basis in respondent's obligation to adequately protect the people of Nassau County by minimizing loss of police manpower. Since it can be demonstrated that the participation of one hundred (100) police officers in military reserve programs is detrimental to residents of the County, Respondent, as heretofore stated, has clearly implemented the Rule through the least restrictive means possible. Rule 15 serves a compelling government interest. Certainly a rule which survives strict scrutiny satisfies the rational basis standard.

Furthermore, the right which Petitioner asserts is the right to be given precisely the same opportunity to participate in the military reserves as is given an employee in the private sector. Petitioner, however, is not such an employee. He is a police officer whose employer has "in accordance with its well-established duty to keep the peace, placed a myriad of demands upon the police force, duties which have no counterpart with respect to the public at large." *Kelley v. Johnson*, ———U.S.———, 47 L.Ed. 2d 708, 96 S.Ct.——— (1976). One of the demands placed on Petitioner as a Nassau County police officer is that he abide with the rules designed to regulate the number of police officers serving in the reserves at one time, a rule which Petitioner was well aware of when he initially accepted employment, and agreed to comply with upon acceptance of such employment by the Police Department.

In light of the foregoing, it is evident that Petitioner's constitutional attacks on Rule 15 are without merit and it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Conclusion.

For the reasons stated above, the petition herein should be denied in all respects.

Respectfully submitted,

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